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Supreme Court of The United States

OCTOBER TERM, 1977

No. 77-1166

PHILADELPHIA GAS WORKS,

Petitioner,

v.

GULF OIL CORPORATION AND TEXAS EASTERN
TRANSMISSION CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT TEXAS EASTERN TRANSMISSION CORPORATION IN OPPOSITION

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**BRIEF OF RESPONDENT TEXAS EASTERN
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Texas Eastern Transmission Corporation (Texas Eastern) opposes granting the petition for writ of certiorari requested by Philadelphia Gas Works (PGW) in the captioned proceeding for reasons set forth herein. However, prior to detailing such reasons, Texas Eastern would point out to the Court certain erroneous statements contained in the Petition for Writ of Certiorari filed by PGW.

(1) PGW states in its Petition that the Federal Power Commission (Commission) "issued an order directing both Texas Eastern and Gulf Oil Corporation (Gulf) to show

cause why they were not in violation of the certificate of public convenience and necessity." (PGW Pet. 4). The Commission did not issue such an order to Texas Eastern. Rather, it required Texas Eastern to show cause why it should not pursue the remedies available to it as a result of Gulf's alleged underdeliveries. (Appendix filed in *Clark, et al v. Gulf Oil Corporation*, Nos. 77-1661, et al, 3d Cir. at 12).

(2) PGW states in its Petition that the Commission found Gulf in violation of the Natural Gas Act, 15 U.S.C. § 717 et seq. (PGW Pet. 4). PGW offers the Court the alternative of holding that a private right of action exists only if there is an administrative determination of violation. PGW insists that "upon the facts in this case, the Commission found that Gulf violated section 7(c) of the Act." (PGW Pet. 13). To the contrary, nowhere in Opinion Nos. 708 or 780-A did the Commission find Gulf to be in violation of the Natural Gas Act. The only finding was that Gulf had violated its *certificate of public convenience and necessity* issued under Sections 7(c) and 7(e) of the Natural Gas Act. A violation of a certificate and a violation of the Act are not necessarily synonymous.

(3) PGW states in its Petition that the Commission approved its pursuing a private cause of action. (PGW Pet. 10, 11). Further, PGW places reliance on this "approval" by the Commission in invoking the principle of administrative law that the "Commission's interpretation of the Natural Gas Act should be accorded great weight" (PGW Pet. 10, see also PGW Pet. 12). Not so. The Commission did not rule on whether or not customers would be entitled to maintain a private cause of action under the Natural Gas Act. Rather, the Commission stated in Opinion No. 780-A:

The [refund] formula may or may not cover all the effects of Gulf's non-delivery, and the Commission's decision to order the payment of refunds does not prevent PGW or other customers and distributing companies served through Texas Eastern's system from seeking additional relief in whatever forum they choose if they find that relief inadequate. Neither Opinion No. 780 nor this opinion preclude such action, nor does the Commission take any position on the merits of such proceedings.

REASONS FOR DENYING THE WRIT

Much of PGW's argument falls as a result of such misstatements. To the extent that such misstatements do not mandate denial of the Petition for Writ of Certiorari, the Petition should be denied because:

I.

The Court Below Correctly Held That There Was No Private Right of Action in Favor of PGW

The court below merely applied the test for determining whether or not there is an implied right of action under a statute which this Court set forth in *Cort v. Ash*, 422 U.S. 66 (1975), and has since reaffirmed.¹ PGW's claim does not satisfy *any* of the *Cort* tests. Neither PGW nor the consuming public are members of a group for whose "especial" benefit the Act was adopted. There is nothing in the Act

¹ First, is the Plaintiff one of the class for whose especial benefit the statute was enacted? Secondly, is there any indication of legislative intent, explicit or implicit, either to create a private cause of action or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the Plaintiff? Fourth, is the cause of action one traditionally relegated to State law, in an area basically the concern of the State, so that it would be inappropriate to infer cause of action solely on Federal law? *Cort v. Ash*, 422 U.S. at 778. *Santa Fe Indus., Inc. v. Greene*, . . . U.S. . . ., 51 L.Ed.2d 980, 97 S.Ct. . . . (1977).

itself, nor in the legislative history, to indicate Congressional intent to imply a private cause of action for violation of Section 7. Implication of a private right of action in favor of PGW and other consumers would have a tremendous impact on companies regulated under the Natural Gas Act and on the courts. Texas Eastern is only one of many natural gas transmission companies transporting gas in interstate commerce and thus subject to the jurisdiction of the Commission under the Natural Gas Act. It, like other transmission companies, holds many certificates of public convenience and necessity authorizing transportation and sales of natural gas for resale, virtually all of which are predicated on contractual arrangements. Texas Eastern alone serves 100 customers, who in turn, serve literally millions of consumers. Texas Eastern's suppliers, like Gulf, sell gas under literally hundreds of certificates of public convenience and necessity and contracts. The situation is the same with regard to suppliers to other interstate transmission companies. Had Congress intended to vest every one of the millions of gas consumers with private causes of action for breaches of certificated contracts, surely it would have said so.

Nor is this a case in which to read Congressional silence as implying that a private right of action was contemplated or would be consistent with the regulatory scheme under the Natural Gas Act. To the contrary, the very comprehensiveness of the regulatory scheme indicates that it is the Commission, not private consumers, which is to implement the Act. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). Any other decision would *inevitably* result in conflicts between court decisions in cases based on private causes of action under the Natural Gas Act and decisions of the Commission, which conflicts would interfere with the Commission's regulation under the Act. Finally, as the real basis for

PGW's claim is Gulf's failure to perform its contract, the subject matter of this case is clearly one traditionally relegated to state law.

II.

The Question Whether the Natural Gas Act Implies a Right to Relief "In the Nature of a Performance Bond" Is Not of Special and Important Consideration

While the academic question whether a private cause of action is to be implied from a violation of the Natural Gas Act may be one of importance, the issue in the context of the facts and relief sought here is "episodic". Cf., *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). PGW does not seek damages in the usual sense. It concedes in its petition that "the relief it seeks is unusual in that an appropriate portion of the relief received would be repaid to Gulf upon Gulf's future performance" (PGW Pet. 13).² This relief is characterized as being "in the nature of a performance bond" (PGW Pet. 13). The Commission has imposed refund obligations on Gulf for the same underdeliveries which are likewise characterized as being in the nature of a performance bond. *Gulf Oil Corporation v. Federal Power Commission*, 563 F.2d 588 (3d Cir., 1977), cert. denied, 46 U.S.L.W. 3520 (Feb. 20, 1978). Whether multiple performance bonds should be imposed on Gulf as a result of its underdeliveries is not, it is submitted, of sufficient importance to warrant the granting of certiorari.

III.

There Is No Conflict Between Circuits

PGW asserts that the Third Circuit's decision conflicts with the decision of the Eighth Circuit in *Farmland Indus-*

² PGW does not explain how state or federal rate approvals would be obtained to implement such repayment.

tries Inc. v. Kansas-Nebraska Natural Gas Co., Inc., 486 F.2d 315 (8th Cir. 1973) "to the extent Gulf violated Section 7(b) of the Act" (PGW Pet. 16). There is no conflict. In *Farmland*, there was an admitted, intentional discontinuation of deliveries. Gulf's failure to deliver was due to a temporary inability of connected reserves to supply the contract requirements. Gulf has consistently stated that it would deliver the 4.4 trillion cubic feet covered by the contract. Neither the Commission nor the court has held it to be in violation of Section 7(b) of the Act.

PGW argues:

Although *Farmland* did involve a permanent reduction in service, this does not preclude a holding that substantial (albeit temporary) reductions for extended periods of time are also Section 7(b) abandonments. (PGW Pet. 15).

It may not preclude such holding; it does preclude a conflict between circuits, however.

Furthermore, as the Third Circuit noted, *Farmland* was decided prior to the decision of this Court in *Cort v. Ash, supra*. The Eighth Circuit's analysis of the facts was thus not in the context of the requirements enunciated in *Cort*. No conflict exists in situations where there is an intervening Supreme Court decision. See R. Stern and E. Gressman, *Supreme Court Practice* (4th ed) at 157.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari of PGW should be denied.

Respectfully submitted,

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